ORIGINAL

EX PARTE OR LATE FILED

WILLKIE FARR & GALLAGHER

EX PARTE

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

VIA HAND DELIVERY

August 18, 2000

RECEIVED

AUG 18 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

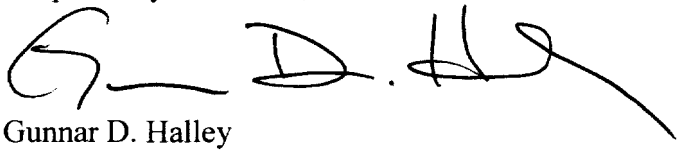
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from the undersigned on behalf of the Smart Buildings Policy Project to Peter Tenhula, Senior Legal Advisor to Commissioner Powell, delivered today that concerns the above-referenced proceedings.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Buildings Policy Project's written ex parte presentation (with attachment).

Respectfully submitted,



Gunnar D. Halley

Counsel for the
SMART BUILDINGS POLICY PROJECT

cc: Peter Tenhula

Enclosure

No. of Copies rec'd 0+3
List A B C D E

WILLKIE FARR & GALLAGHER

VIA HAND DELIVERY

EX PARTE

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

August 18, 2000

Mr. Peter Tenhula
Senior Legal Advisor
Office of Commissioner Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WT Docket No. 99-217 and CC Docket No. 96-98

Dear Mr. Tenhula:

During the course of our meeting yesterday, we discussed the Supreme Court's *Ambassador* decision[1] and the Commission's ability to adopt a similar approach in the context of the *Competitive Networks* rulemaking. That approach relies, in part, upon the Commission's statutory authority to join and issue orders against non-carrier parties to an enforcement proceeding who would be affected by or have an interest in the practice under investigation.[2] In the *Ambassador* case, the Supreme Court decided that Section 411(a) was properly applied to join the hotels as parties defendant and concluded in its 7-0 decision that an injunction against the hotels was appropriate under Section 411(a) even though no injunction issued against the telephone companies.[3] Attached is a summary of the parties' Supreme Court briefs in the *Ambassador* case.

As far as we have been able to discern, *Ambassador* represents the entirety of judicial consideration of Section 411(a). The provision is derived from an analogous provision in the Interstate Commerce Act.[4] Judicial interpretations of the Interstate Commerce Act provision lend additional support to the conclusion of the *Ambassador* Court that the joinder provisions give the regulatory agency the authority to impose judgments against non-carriers in appropriate circumstances.[5]

---

1 Ambassador, Inc. v. United States, 325 U.S. 317 (1945).

2 47 U.S.C. § 411(a).

3 Ambassador, Inc., 325 U.S. at 325-26.

4 See S. Rep. No. 781, 73d Cong., 2d Sess., at 10 (1934)("Section 411 carries forward provisions of the Elkins Act and of section 16(4) of the Interstate Commerce Act relating to joinder of parties and payment of money."). The analogous provision of the Interstate Commerce Act is now found at 49 U.S.C. § 42.

5 See, e.g., United States v. Baltimore & O.R. Co., 333 U.S. 169, 171 n.2 (jurisdiction over stock yard practices); see id. at 177 ("Of course it does not deprive an owner of his property without due process of law to deny him

During the course of our meeting yesterday, you inquired as to whether the Commission had used or discussed use of Section 411(a) of the Communications Act in prior decisions. The history of the Commission's rules governing the use of recording devices presents a scenario quite similar to the one underlying the *Ambassador* case and the enforcement of those rules is premised partly upon an appropriate reading of Section 411(a). The Commission prescribed telephone company tariff provisions permitting the use of customer-provided telephone recording devices, and mandated a beep tone to ensure that parties to a telephone conversation were aware they were being recorded. In commenting upon the effect of these tariff provisions, Commissioner Kenneth Cox explained:

> The tariffs filed by the carriers with this Commission require, as a condition of service covered by those tariffs, that no subscriber may use recording device in connection with telephone service without the 'beep' tone. It is the scheme and intent of the provisions of the Communications Act that the carriers have the basic responsibility to render service in accordance with the terms and conditions of their tariffs and to insure that their customers comply with such terms and conditions. These tariffs, so long as they are in effect, have the force of law as to both the telephone users and the carriers. Failure on the part of users to comply with the terms of the tariff in this respect subjects them to possible loss of service, and to injunctive action pursuant to Sections 401(b) and 411(a) of the Communications Act.[6]

The Commission has used its Section 411(a) authority on many occasions to join to a proceeding parties who are interested in or affected by the matter at issue, typically above the objections of the joined parties.[7] In the FCC decisions citing Section 411(a), the Commission

---

the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve."); see also United States v. City of Jackson, Mississippi, 318 F.2d 1, 16-19 (5th Cir. 1963)(enjoining sheriff's enforcement of racially segregated waiting areas in railroad and bus terminals, and citing to the extensive use of Section 42 of the Interstate Commerce Act to enjoin the practices of non-carriers). Incidentally, in the City of Jackson case, Harold Greene appeared for the United States Department of Justice.

6 Amendment of Part 64 of the Commission's Rules Relating to Use of Recording Devices by Telephone Companies, Docket No. 17152, *Notice of Proposed Rulemaking*, 6 FCC2d 587 (1967)(concurring statement of Commissioner Kenneth A. Cox).

7 See, e.g., Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co., Docket No. 17441 et. al, *Memorandum Opinion and Order and Certificate*, 18 FCC2d 783 at ¶ 13 (1969); Armstrong Utilities v. General Telephone Company of Pennsylvania, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 FCC2d 385 at ¶ 8 (1970); Warrensburg Cable, Inc. v. United Telephone Co. of Missouri, Docket Nos. 19151, 19152 P-C-7655 P-C-7656, *Memorandum Opinion and Order*, 27 FCC2d 727 at ¶ 22 (1971); Comark Cable Fund III v. Northwestern Indiana Telephone Co., File No. E-84-1, *Memorandum Opinion and Order*, 103 FCC2d 600 at ¶ 15 (1985); Continental Cablevision of New Hampshire, Inc., Docket No. 20029, *Memorandum Opinion and Order*, 48 FCC2d 89 at ¶ 6 (1974).

uniformly interprets the provision broadly as enabling joinder of the relevant parties. As a Common Carrier Bureau Order states,

> Section 411 of the Communications Act grants broad authority to the Commission as to parties who may be brought before it in any proceeding. . . . The Commission has required the inclusion of parties based on factors such as ownership and control of other essential parties, or where the party to be joined would be interested in or affected by a rule or other matter under scrutiny.[8]

The Commission's historic use of Section 411(a), in conjunction with the unanimous Supreme Court decision approving of the use of that provision to enjoin non-carriers from certain practices, demonstrates that it would be wholly appropriate for the Commission to employ the provision to accomplish nondiscriminatory telecommunications carrier access to MTEs.

Respectfully submitted,

Gunnar D. Halley

Counsel for the
SMART BUILDINGS POLICY PROJECT

Enclosure

---

[8] General Services Administration v. American Tel. & Tel. Co., File No. E-81-36, *Order*, 2 FCC Rcd at n.20 (CCB, 1987).

SUMMARY OF *AMBASSADOR, INC.* BRIEFS

The appellants (the hotels) appealed the Ambassador case to the Supreme Court because the District Court for the District of Columbia had enjoined the hotels from making their surcharges to guests on their long distance calls, which violated the tariff of C&P Telephone Co. and AT&T. The tariff stated that message toll telephone service furnished to hotels would not be made subject to any charge by any hotel.

The District Court's Oral Opinion enjoining the hotels was part of the Court's record. The opinion states that the FCC was created for the benefit of the public and to protect the public from being overcharged. It found that the hotels' surcharges violated the tariff. It stated that the hotels were accomplishing what the "telephone company is not allowed to do, and what the law, by its express and implied terms, and by the regulations of the Commission, and its orders, did not mean to allow." The hotels claimed their charges were justified because they needed to recoup the costs of the secretarial type work they were providing their guests (taking messages, etc.) But the court said they could recoup their costs in other ways (for example, increase the rates for rooms, food and drinks).

The Hotels' Brief:

The hotels argued that only carriers are required to file tariffs showing charges for itself and its connecting carriers for interstate and foreign wire communication. They argued that their surcharges were not for the benefit of the phone company but for those costs incurred by the hotels for providing secretarial services to their guests, such as the taking of messages, connecting calls at guests' requests, locating guests to receive calls, etc. They also argued that they are not connecting carriers, but subscribers of the telephone company. Even if they were connecting carriers, they argued that the tariff would be unenforceable against them because the hotels had not agreed to or concurred in the schedule. They argued that the schedule was unenforceable because it regulates charges for services which are not for wire communications, but for secretarial services.

They asserted that to hold that the operation of a PBX board with operators and secretaries as "wire communication" would place many businesses under the purview of the Act and the Commission. "It is inconceivable that what all such firms, business houses, and courts do is within the term 'wire communication' by a carrier for the purposes of the Act." The Commission would be permitted to regulate the business of many other organizations on the same theory that it seeks to regulate the service between the PBX board and the extension telephone as wire communication. They argued that charging guests for the secretarial services provided when making phone calls by adding a surcharge to the telephone company's charge is the fairest way to recoup the costs from guests because those guests making calls are the ones using the secretarial services. They claimed that guests were not confused into thinking that the surcharges were charges of the telephone company.

They argued that Section 203 deals only with the charges of carriers and with the rules, regulations or practices affecting such charges. Just because a condition is stated in a tariff, it does not bind the subscriber and its business practices.

They also claimed that Section 411(a) cannot be violated by the hotels when the telephone company was not found to have violated 411(a).

The Government's Brief:

The U.S. argued that the definition of "wire communication" is comprehensive and includes all transmission between the points of origin and reception of such transmission, as well as all instrumentalities, facilities, apparatus, and services incidental thereto. The U.S. stated that the PBX system and its operators, whether or not supplied or controlled by the hotels, are instrumentalities, facilities, apparatus and services incidental to the transmission of calls, just as the central exchange system, wires, instruments and services supplied and controlled by the telephone companies are. "Acceptance of appellants' contention would substantially frustrate effective public regulation of charges for interstate and foreign communication service, for it would mean that appellants and others similarly controlling access to the use of telephones would be able freely to resell telephone service to the public and impose charges thereon additional to the charges specified in the telephone companies' filed schedules."

The U.S. also stated that under the hotels' theory the Commission could prescribe rates on long distance calls to and from the PBX board, but neither the Commission nor any other agency charged with the regulation of telephone rates could prevent any amount of additional charges being assessed against the guests making or receiving the call. The U.S. asserted that this result would be contrary to the underlying policy of the Communications Act and pointed to the Commission's Order which asserted that its role as regulator of rates could be undermined.

The hotels' surcharges are based upon telephone service supplied to guests, not the hotel services supplied. As such, they should be included in schedules filed under Section 203 of the Act. Section 203 is not limited to charges which accrue only to the financial benefit of the carrier. The U.S. explained that the Communications Act was "designed to afford 'safeguards against excessive and discriminatory charges to the using public,' and unless its language compels otherwise it should be construed to that end."

Carriers may lawfully condition service in their tariffs. Regulations defining the rights, privileges, and restrictions attaching to a particular type of service offered are commonplace in tariffs. There is no effort to control the hotels' businesses, as they may recoup their secretarial expenses through other means. "The thrust of the regulation is merely at the practice whereby the hotels, in the guise of reimbursing themselves for hotel services, in fact subject the use of interstate and foreign telephone service to charges not contained in the published effective tariffs for such service."

The U.S. rejected the assertion that injunctions may be issued under Section 411(a) against entities that are not carriers only when necessary to aid in the enforcement of the Act against carriers. Though Section 203(c) speaks in terms only of carriers, the U.S. stated that the section was not intended to supersede the general principle of rate regulation that once a valid tariff is filed it has the force and effect of law, and must be complied with by both carrier and customer until changed or set aside.

It also stated that Section 411(a) supplements Section 203(c) to the extent of authorizing judicial action to bring about compliance with a filed tariff by all persons "interested or affected" thereby, whether or not they are, or are acting for, carriers upon whom the express obligations of Section 203(c) are placed. But the U.S. did not rely on this. Rather, it stated that the record shows that the telephone companies were violating their tariff because they knew that the hotels continued to add surcharges in violation of the tariff. While no injunction was in fact issued against the telephone companies, Section 411(a) authorizes that making of orders and decrees against additional parties "in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers" -- not merely to the same extent as such orders or decrees *are* issued against carriers.

Telephone Companies' Brief:

The telephone companies explained that the language in the tariff is a condition of service upon subscribers and that the surcharges imposed by the hotels violates the tariff. The surcharges impact the business of the telephone company because they are a deterrent to the use of the service and a "disturbing element in the relations of the telephone companies with the public." The surcharges are collected only when the toll service of the telephone company is used, and the surcharges are determined by the amount of the telephone company's charge. The tariff merely impacts the use of telephone service; it does not regulate the hotels' businesses. The tariff is valid, and the hotels must comply with it. To the extent that the telephone companies provided service to hotels while they continued to add surcharges was for four days until this case was brought.